

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

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SECRETARY OF STATE
OF CALIFORNIA

In re:)	1990 OAL Determination No. 2
Request for Regulatory)	
Determination filed by)	[Docket No. 89-008]
Michael Greenbaum)	
concerning the Department)	February 8, 1990
of Parks and Recreation's)	
Whitewater Recreation)	Determination Pursuant to
Management Plan for)	Government Code Section
commercially operated)	11347.5; Title 1, California
boating on the North Fork)	Code of Regulations,
and Middle Fork of the)	Chapter 1, Article 2
American River ¹)	

Determination by:


JOHN D. SMITH
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney
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SYNOPSIS

The issue presented to the Office of Administrative Law is whether the Department of Parks and Recreation's management plan for commercially operated recreational whitewater boating on the North Fork and Middle Fork of the American River is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law concludes that those portions of the management plan which require permits for, and impose conditions, restrictions and limitations on, the conduct of commercial boating activity fall within the definition of "regulation" requiring adoption in compliance with the Administrative Procedure Act.

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THE ISSUE PRESENTED²

The Office of Administrative Law (OAL) has been requested to determine³ whether the Department of Parks and Recreation's ("Department") management plan for commercially operated recreational whitewater boating on the North Fork and Middle Fork of the American River is a "regulation" required to be adopted pursuant to the Administrative Procedure Act.⁴

THE DECISION^{5, 6, 7, 8, 9}

OAL finds:

- I. That the provisions of the management plan which require commercial operators to acquire permits as a condition to conducting commercial boating activity on the river and regulate the manner in which commercial boating activities are conducted on the river, are subject to the requirements of the Administrative Procedure Act (APA), are "regulations" as defined in Government Code section 11342, subdivision (b), and therefore violate Government Code section 11347.5, subdivision (a).
- II. That other elements of the management plan which recite facts including a description of the river, the history of its use, and the history of the regulation of its use, or, mention the existence of valid and enforceable law, are not subject to the requirements of the APA.

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REASONS FOR DECISION

I. AGENCY; AUTHORITY; BACKGROUND

Agency

The Department of Parks and Recreation ("Department") is a part of the Resources Agency. In administering the State Park System, the Department succeeds to duties originally delegated in 1927 to the Department of Natural Resources and the State Park Commission.¹⁰ The Legislature has delegated to the Department the duty to:

"[A]dminister, protect, develop, and interpret the property under its jurisdiction for the use and enjoyment of the public."¹¹

Authority¹²

The Department is delegated authority to make rules for the administration and government of the State Park System at Public Resources Code section 5003:

"The department [of Parks and Recreation] shall administer, protect, develop, and interpret the property under its jurisdiction for the use and enjoyment of the public. Except as provided in Section 18930 of the Health and Safety Code [State Building Standards Code], the department may establish rules and regulations not inconsistent with law for the government and administration of the property under its jurisdiction. . . ." [Emphasis added.]^{13, 14}

Background: This Request for Determination

To facilitate understanding of the issues presented in this determination, we set forth the following facts.

The portions of the North Fork and the Middle Fork of the American River which are involved constitute about 37 miles of river suitable for whitewater boating. Construction of a dam in this area (the "Auburn Dam") was authorized by Congress in 1965-66. This dam has never been built. If the dam had been built as originally planned, these sections of the river would have been inundated by lake water.

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The pattern of land ownership along the river is complex, with tracts under the control of various federal agencies, state agencies, and private land owners. Since 1977 the Department has administered (1) land under the control of the United States Bureau of Reclamation ("USBR") pursuant to a federal-state agreement for construction and operation of recreation and wildlife enhancement facilities¹⁵ and (2) land under the control of other state and federal entities, through one or more other agreements.¹⁶

The Department has exercised control over commercially operated whitewater boating on the river since 1982 by issuing permits, charging fees, and imposing controls on group size, number of trips, trip starting times, and imposing various other requirements.¹⁷

"The Auburn Reservoir Project / Folsom Lake Recreation Area Preliminary General Plan" of 1978 assumed that the whitewater reaches of the North Fork and Middle Fork of the American River would be inundated, and no provision was made in that plan for the type of recreation addressed in this Determination. In this "Preliminary Plan" there is reference to the Department's pending decision whether or not to submit the general plan to the State Park Commission for review pursuant to the Public Resources Code, or to bypass the Commission. In any case, this document is a preliminary general plan, not one which has been subject to review by the Commission, including discussion at a public hearing, as described in Public Resources Code section 5002.3.

Although the monitoring of use of the river began at least as early as the 1960's and management of the whitewater recreational resource began as early as 1982, systematic planning came later. In 1984 the Department contracted with Chuck Watson, Environmental Consulting, to study whitewater recreation on the river and make proposals for its management. This resulted in the "Proposed Whitewater Recreation Management Plan for the North Fork and Middle Fork American River" ("PWWMP"), dated December, 1985.

The PWWMP discusses, among other things, characteristics of the river, history of its use, and history of the regulation of its use, and proposals for management, including both internal procedures and direct regulation of users. Examples of proposed internal procedures include proposals for continued monitoring of use and the effect of use, with predetermined levels of use which, when reached, trigger reconsideration by the agency of elements of the management plan. Examples of direct regulation are proposals to

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require permits of commercial users, allocation of the use of the river among commercial users, and regulation of the manner of operation of the commercial users.

During 1986 an "Advisory Task Force" composed of commercial operators, environmental group representatives, and private recreational users was formed by the Department to review the PWWMP and make recommendations to the Department.¹⁸ This group met fourteen times and made recommendations to the Department.¹⁹ The Requester, Michael Greenbaum, was a member of the Advisory Task Force.

In 1987, after consideration of the input of the Advisory Task Force, the Department issued its "Draft Whitewater Management Plan North Fork and Middle Fork American River" ("DWWMP"). The text of the DWWMP indicated that it was a continuation of a planning process, which began with the PWWMP. It referred to the PWWMP for a detailed description of the river, its history of use, and the history of prior regulation, and concentrated on refining the proposals for management of use of the river. The text specifically indicated that the DWWMP was a part of the development of an eventual management plan, and was not intended to be applied as agency policy. It provides that the existing permit process would be in effect for the 1987 season, and a final whitewater management plan would be effective in 1988.²⁰

A Request for Determination concerning the Department of Parks and Recreation's Whitewater Management Plan for the North Fork and Middle Fork of the American River was filed with OAL on April 21, 1988, by Michael Greenbaum ("the Requester"). On October 27, 1989, OAL published a summary of the Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.²¹ OAL received the Department's Response to the Request for Determination on December 12, 1989.

The Request addressed the Whitewater Management Plan ("WWMP"); however, the entire plan has not been disclosed in the record. According to the Department, the WWMP is comprised of various regulations, procedures and guidelines, which are designed to preserve the environmental resource of the areas, maintain quality recreational experiences, and protect the health and safety of the public.²² In the Request certain specific elements of the WWMP were identified, which generally regulate the time, place and manner of commercial operation of recreational boating on the river.

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The Department's Regulatory Scheme

The Department uses a number of different methods of adopting rules to carry out its duties under the California Public Resources Code. The first method is to follow the procedures of the APA, including publication in the California Code of Regulations (CCR). A review of the Department's regulations published in the CCR reveals rules which generally apply throughout the state park system, and rules which apply only within specific park units. Of special interest in the present proceeding is the inclusion within these regulations of the classification of units of the State Park System in general, and the Auburn State Recreation Unit in particular, as a "state recreation unit."²³

A second method of issuing rules involves the use of a multi-stage statutory procedure for the development of general plans for the administration of individual units of the State Park System. The general plan for a unit must be in place prior to significant investment and development. The process for adoption of a general plan is characterized by the separation of the research and development of proposals from ultimate adoption or approval. Briefly described, the process involves (1) the preparation of a unit inventory by the Department, (2) the classification of the unit by the Commission following review of the inventory and a public hearing, (3) the preparation of a general plan for the operation of the unit by the Department, and (3) the review (and possible approval) of the general plan by the Commission following public hearings.

In the present case, the whitewater stretches of the North Fork and Middle Fork of the American River are included within the geographic area of the Auburn State Recreation Area, which has been classified as a State Recreation Area. Although a Preliminary General Plan has been prepared for the Auburn State Recreation Area, there is no indication in the record that a general plan has been submitted to or approved by the Commission.^{24, 25, 26}

The third method of adopting rules used by the Department is the Posted Orders²⁷ procedure. This process is described in Title 14, CCR, section 4301(i):

"Posting of Notices. The term 'posted' as used herein, unless otherwise indicated, shall mean and require that the Department shall set aside at the district headquarters and at the unit affected and in a location convenient to the general public, a bulletin board or

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similar device upon which shall be posted all special instructions, orders pertaining to units of the district including but not limited to special hours of operation, swimming and boating restrictions, hunting and camping restrictions, and special instructions pertaining to areas where activities are curtailed or restricted. Proof of posting shall be filed in the offices of the regional directors" [Emphasis added.]

Finally, other regulations of the Department published in the CCR make provision for the modification of a rule's general effect by posting of notices, by designation of the Department, and by permission of the Department. In particular, regulation section 4325 allows the Department to close or curtail access by posting notice. Similarly, section 4326 allows the Department to control use periods by posting notice:

"No person shall violate any provision of an order posted pursuant to the provisions of Section 4301 (i) hereof."

It appears that the use of this process is commonly relied upon by regional department officers in the management of the units of the park system. A major element of the WWMP, insofar as it has been disclosed in the record, is the Commercial Boat Permit Process established by the Department in its Posted Order 3-5-89.²⁸

The above generally describes the formal scheme used by the Department for carrying out the administration of the State Park System.

II. ISSUES

The three main issues before us are:²⁹

- (1) WHETHER THE APA IS APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

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FIRST, WE INQUIRE WHETHER THE APA IS APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

The APA generally applies to all state agencies, except those in the "judicial or legislative departments."³⁰ Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.³¹

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A REGULATION WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines regulation as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ."
[Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

- (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]"
[Emphasis added.]

Applying the definition of "regulation" found in the key provision of Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the challenged rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

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Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

In its Response, the Department concedes that its Whitewater Management Plan is comprised of:

"... various regulations, procedures, and guidelines
..."

and refers to the WWMP as a whole as:

"The guidelines (management plan) for boating activity on the North and Middle Forks of the American River
..."

However, the final and effective WWMP is never clearly identified as a whole, and it appears that no complete management plan has ever been adopted by the agency. Instead, the WWMP exists in discrete elements, certain of which have been disclosed in the record, and are reviewed here. Other elements of the plan may exist, but they are not in the record and therefore will not be reviewed.

Focusing on the particular elements subject to this Determination, the answer to the first part of the inquiry is "yes." For an agency rule or standard to be of general application within the meaning of the APA, it need not apply to all citizens of the state.³² The challenged rules significantly affect all persons who wish to operate commercial boating tours on the river and all persons who wish to participate in commercially operated tours. The challenged rules also affect all other persons who use or might use the river by affirmatively allowing a certain level of commercial use of a limited resource. Additionally, these rules are appropriately the concern of individuals throughout the state, in that they affect the administration of the lands within the State Park System.

Identification of the Challenged Rules

As stated above, Michael Greenbaum filed a Request for Determination with OAL challenging the Whitewater Management Plan for the North Fork and Middle Fork of the American River. In this determination proceeding, OAL was not

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provided with a complete statement of the Whitewater Management Plan, and did not review it. After a brief discussion of the application of rulemaking concepts to management plans, OAL will limit its discussion and analysis to elements of the plan which have been disclosed in the record before us.

The terms "general plan" and "management plan" as used in the Public Resources Code sections concerning the Park System, and as used in the documents reviewed by OAL, mean more than simply blueprints or proposals for current or future operations on land within the Park System. The terms encompass a detailed evaluation of the property as it exists prior to the implementation of management, a discussion of alternative proposals and a rationale for the selection of the proposal eventually adopted, and the policies, regulations, guidelines, and procedures eventually adopted. As found earlier, those portions of the WWMP which only recite facts concerning the existing resource, and those which only discuss the possible alternative proposals for administering the property, are not "regulations." In contrast, those quasi-legislative acts by which the Department implements, interprets, makes specific, or otherwise carries out the laws that it enforces or administers are "regulations," although some of these may not be subject to the APA process, as discussed below.

Discussion of Disclosed Elements of the WWMP

1. The Commercial Boat Permit Application

The Department established the Commercial Boat Permit Application and permitting process through the Posted Order process described above under "Background." The record indicates that there are slightly different application forms for the North and the Middle Forks, and that the application process has been in place in substantially the same form since 1986, with revised versions of the application for each year since then. The most recent application included in the record is for 1990. For the sake of economy, we will review the 1990 application for the North Fork, and we intend that our discussion and analysis of this application will apply to each of the other applications.

The application is a nineteen-page document. The first two pages solicit the identification, address, and telephone number of the company applying for the permit, the owners of the company, and persons to be contacted in case of

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emergency. The third page is what most people would call the permit. It provides in part:

"This permit, when officially approved, will authorize [blank for name of permittee] as the permittee, to make use of various State park lands and facilities within Auburn State Recreation Area, from January 1, 1990 through December 31, 1990, for the purpose of COMMERCIAL boating activity on the 14 mile run on the American River North Fork from Colfax/Iowa Hill Bridge to the upper end of Lake Clementine."

"PERMIT CONDITIONS ACCEPTED BY:"

Owners Signature

Date

Owner's Name (Type or Print) "

This page also has an "official use" only section for the Department to indicate whether a fee has been paid, whether a certificate of insurance has been received, and whether the permit has been approved.

The next thirteen pages, numbered one through thirteen, set forth in detail "USE PERMIT REQUIREMENTS" and a "GLOSSARY" of terms for use in reading the requirements. Included in these requirements are: limits on the number of trips per day; the number of boats per trip, the number of persons per boat, conditions in which boat trips may or must link-up with another company's boat trip, procedures for reporting boat trips, timeliness requirements for trip starting, procedures for transferring drawn start assignments between companies, restrictions on the use of access roads and parking, boat and vehicle labeling requirements, boat equipment requirements, food preparation and waste disposal requirements, camping regulations, emergency notification procedures, use reports and fee payment requirements, insurance requirements, enforcement provisions including inspections, suspensions, and fines, hold-harmless agreement, first aid training and boating experience and skill requirements for operators. The permit application specifically provides for a non-refundable seventy-five dollar application fee, restrictions on the transferability of trip starting times between permittees, and assessment of penalties for non-compliance with permit conditions.³³

With limited exceptions to be discussed below, these provisions meet the second prong of the test: they each implement, interpret, or make specific the law administered by the Department or govern the Department's procedure.

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The exceptions to the application of the second prong of the test occur where the provision set out by the agency merely recites the existence of an otherwise valid and enforceable law.

In the present Determination it is impossible to fully discuss this issue because the record lacks the facts necessary to determine whether federal law may be applicable. Much of the land subject to the management plan is federal land under the jurisdiction of the United States Bureau of Land Management, or some other federal agency. Generally, land subject to federal jurisdiction is subject to federal law, not state or local law. However, there are many exceptions to this rule. Some may be found in federal statutes and federal regulations; however, we have not found any such exemptions which appear applicable to the land subject to the management plan. Additional exceptions may be provided by agreement. As noted earlier, none of the agreements, memoranda of understanding, or other arrangements by which the Department operates the Auburn State Recreation Area in part on federal land are included in the record of this proceeding. Therefore, we are only able to advise the Department that federal law may be applicable on those tracts of land which are under federal jurisdiction but for an agreement; and, whether California or federal law is applicable on those tracts depends in part on the terms of the applicable agreement or agreements.

With reference to land upon which California law is applicable, including federal land which has been made subject to California law, state law and local ordinances apply on land owned by the state, local public entities or private persons.³⁴ To the extent that existing and effective law is applicable, it may be enforced by the Department.

Regulations of the Department of Boating and Waterways^{35, 36} govern some aspects of the conduct of commercial boating activity. In particular, these rules require one personal flotation device for each person on board,³⁷ fire suppression equipment,³⁸ and reporting of accidents and casualties.³⁹ These regulations are enforceable by the Department of Parks and Recreation; however, they are not the same as the rules issued by the Department in the "Use Requirements" of the Commercial Boat Permit application. There is no requirement for an extra personal flotation device, reporting accidents specifically to the Department, or, helmets in the "Equipment Requirements." Nor are the other "Equipment Requirements" duplicated.

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The California Highway Patrol has regulations concerning the safety aspects of bus operation, and documentation,⁴⁰ and these would be enforceable by the Department. However, these are not identical to the rules issued by the Department in the "Use Requirements."

Although not in the record of this proceeding, any valid and effective County of Placer ordinances concerning the preparation of food would be enforceable by the Department.

The "Use Requirements" make very general provision for compliance with all Federal, State, County laws and regulations⁴¹ and indicate that it is the responsibility of the permittee, not the Department, to arrange for whatever other permits must be obtained from government entities or private landowners for road use and camping.⁴² With the caution that those laws which must be complied with are restricted to those which are valid and effective, these general advisements regarding other existing and effective law do not meet the second prong of the test because by them the Department does not implement, interpret or make specific the law enforced or administered by it, nor do they govern the Department's procedure.

One other set of Department requirements was specifically identified by the Requester and responded to by the Department, concerning documentation by permittee companies of their status as good faith business entities. The Requester submitted copies of letters which required that permittees submit to the Department brochures advertising their river trips. Presumably this was for the purpose of assuring that permit applicants were persons who intended to actually conduct river trips, as opposed to persons who might be speculating in a market for commercial trip rights on the river. Under the same analysis as used for the Commercial Boat Permit Application, this submission requirement is a "regulation" which must be adopted pursuant to the APA in order to be effective.

We conclude that the permit requirement, the Commercial Boat Permit Application, the elements of the Whitewater Management Plan identified in the Commercial Boat Permit Application, and the submission of documentation requirements are "regulations" as defined in Government Code section 11342, subdivision (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

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Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless they have been expressly exempted by statute from the application of the APA.⁴³ Rules concerning certain activities of state agencies--for instance, internal management--are not subject to the procedural requirements of the APA.^{44, 45}

The "internal management" exception of the APA is contained in Government Code section 11342, subdivision (b), and provides:

"(b) 'Regulation' means every rule, regulation, order, or standard of general application . . . except one which relates only to the internal management of the state agency. . . ." [Emphasis added.]

Certain elements of the Whitewater Management Plan appear to fall within the internal management exception. In particular, the establishment of flags or indicators (measures of use or indications of over-use) which are established in the plan as conditions which will trigger review of the current plan provisions and possibly the development of new or revised plan provisions, appear to be items of internal management.

Other exceptions to the applicability of the APA are contained in express exceptions contained in other legislation.⁴⁶ In its Response the Department points to its "Posted Orders" regulation at Title 14, CCR, section 4301(i) (quoted above at pp. 37-38) as authority for its establishment of the Commercial Boat Permit Application, and related permit conditions.

Administrative agencies only have that power to act which has been delegated to them by the Legislature, and can only act within the procedure prescribed by the Legislature. To be effective, an agency action must be within the scope of authority conferred and in accordance with the standards prescribed by other provisions of law.⁴⁷ An administrative agency does not have the authority to exempt itself from rulemaking procedures imposed by the Legislature.⁴⁸ Therefore, whatever the meaning of the regulation establishing the "Posted Orders" process, it cannot exempt the Department from the application of the APA.⁴⁹

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III. CONCLUSION


For the reasons set forth above, OAL finds that:

(1) The "Commercial Boat Permit Application," the "Use Requirements" included in the application, and the "submission of documentation" requirements of the Whitewater Management Plan are subject to the requirements of the APA; are "regulations" as defined in the APA, and therefore violate Government Code section 11347.5, subdivision (a).

(2) Other provisions of the Whitewater Management Plan which are described in this decision are not "regulations" in that they merely recite facts including descriptions of the river, prior history of the use of the river and of the regulation of use, or the existence of valid and enforceable law.

DATE: February 8, 1990


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1. This Request for Determination was filed by Michael Greenbaum, P. O. Box 3163, El Macero, CA 95618. Mr. Greenbaum is a non-commercial recreational user of the North Fork and Middle Fork of the American River, and was a member of the Department of Parks and Recreation's Advisory Task Force which met in 1986 to review the "Proposed Whitewater Recreation Management Plan" and make recommendations to the Department. The Response by the Department was signed by Henry R. Agonia, Director of Parks and Recreation, 1416 Ninth Street, Sacramento, CA 95814, (916) 445-2358.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination as filed with the Secretary of State and as distributed in typewritten form by OAL is "32" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

Since August 1989, the following authorities have come to light:

Los Angeles v. Los Olivas Mobile Home P. (1989) ___ Cal.App.3d ___, 262 Cal.Rptr. 446, 449 citing Jones v. Tracy School Dist. (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved) the Second District Court of Appeal refused to defer to the

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administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in an internal memorandum rather than in an administrative regulation adopted after notice and hearing).

Compare Developmental Disabilities Program, 64 Ops. Cal. Atty. Gen. 910 (1981) (Pre-11347.5 opinion found that Department of Developmental Services' "guidelines" to regional centers concerning the expenditure of their funds need not be adopted pursuant to the APA if viewed as nonmandatory administrative "suggestions") with Association of Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 211 Cal. Rptr. 758 (court avoided the issue of whether DDS spending directives were underground regulations, deciding instead that the directives were not authorized by the Lanterman Act, were inconsistent with the Act, and were therefore void).

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (a), provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a [']regulation,['] as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."
[Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal. App. 3d 1187, 1195, n. 11, 219 Cal. Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a

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"regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. Government Code section 11347.5 provides:

- "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.
- "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.
- "(c) The office shall do all of the following:
 - 1. File its determination upon issuance with the Secretary of State.
 - 2. Make its determination known to the agency, the Governor, and the Legislature.
 - 3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
 - 4. Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a

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written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

5. Reflecting OAL's special expertise in deciding whether or not particular agency rules are subject to California APA requirements, regulatory determinations issued pursuant to Government Code section 11347.5 are--for five reasons--entitled to great weight in judicial proceedings.

First, Government Code section 11347.5, subdivision (e), provides that OAL determinations shall not be considered by a court if a combination of three specified conditions is present. Clearly, the Legislature envisioned that determinations would be considered by the court in all other circumstances. Though the statute does not specify the weight that should be given the determination, it is apparent that the Legislature envisioned and intended that courts would give determinations appropriate consideration.

Noteworthy by its absence from Government Code section 11347.5 is any provision for enforcement of the

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determination by OAL; clearly, it was intended that a citizen unable to obtain voluntary agency compliance with an OAL determination would need to seek judicial relief. A review of pertinent legislative history documents indicates that the basic idea behind the statute was that the OAL determination process would encourage voluntary APA compliance by focusing intense publicity on the rulemaking agency. Thus, while there is no support in the statute for the proposition that determinations are legally binding, it is difficult to argue that the Legislature intended that OAL determinations be given anything less than the "great weight" traditionally accorded the interpretation of a statute by the agency charged with its enforcement. See Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94. Clearly, OAL is the agency charged with the enforcement of Government Code section 11347.5.

Second, the Legislature's special concern that OAL determinations be given appropriate weight in the judicial context is evidenced by the directive contained in Government Code section 11347.5, subdivision (c)(4): that OAL shall "[m]ake its determination available to . . . the courts." [Emphasis added.]

Third, an official legislative analysis of the implementation of Government Code section 11347.5 explicitly states that OAL is the state agency with "statewide expertise" in regulatory matters and is the appropriate agency to administer Government Code section 11347.5 because the administering agency must "enforce regulatory discipline on state departments." [Emphasis added.] [The quoted language is from the "Analysis of the Budget Bill: For the Fiscal Year July 1, 1985 to June 30, 1986," prepared by the Legislative Analyst for the Joint Legislative Budget Committee, dated February 27, 1985, p. 1607.] Responding to a request from the Legislature that the option of transferring responsibility for implementation of Government Code section 11347.5 from OAL to the Department of Justice (DOJ) be evaluated, the Legislative Analyst recommended that OAL continue to administer the program. The passage from the analysis in which the language quoted above appeared reads as follows:

"Our review indicates that transfer of the AB 1013 program is not warranted on programmatic grounds, for two reasons. First, we believe this program is best managed by a control agency [other "control agencies" are the Department of Finance and the Department of General Services, which

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provide central oversight of state agencies in the areas of budget and contracts, respectively] having both oversight and managerial experience. Our analysis indicates that these attributes are appropriate because the implementation of the AB 1013 [Government Code section 11347.5] program requires the administering agency in effect to enforce regulatory discipline on state departments. The OAL currently performs control agency functions; the DOJ--which is basically a client-or service-oriented agency--generally does not.

"Second, transfer of the program would result in an unnecessary duplication of state resources. Currently, statewide expertise in the drafting, review, and screening of regulations rests with OAL. If the AB 1013 program were transferred to the DOJ, departments would have to deal with two separate state agencies on the same set of regulations. Under such a bifurcated system, there would have to be some duplication of expertise among the agencies. There would also be the potential for disagreement between the two agencies as to how informal regulations should be interpreted." [Emphasis added.]

Fourth, OAL issued the first regulatory determination in April 1986 (after the quoted Legislative Analyst report was issued) and has as of January 31, 1990, issued 68 formal determinations. Thus, in the nearly four years since the legislative report was submitted, OAL has substantially increased its familiarity with the legal issue of whether or not an uncodified agency rule is an underground regulation.

Fifth, since April 1986, the Regulatory Determination Program has attained a high degree of acceptance in the legal community. This acceptance is demonstrated by the identity of some of the persons who (1) have submitted requests for determination or (2) have commented on pending requests. [This category does not include agencies simply responding to charges that rules issued by them were illegal.]

Focusing on the public sector, these persons include State Senator Nicholas Petris, Assemblyman Gil Ferguson, Lieutenant Governor Leo McCarthy, Assemblyman Byron Sher, State Senator William Craven, the Department of Personnel Administration, the Department of Consumer Affairs, CalTrans, the Resources Agency, the San Francisco Bay

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Conservation and Development Commission, the City of Hollister, the City of Walnut Creek, and the United States Department of the Interior. Especially noteworthy public sector participants are two state agencies, the State Building Standards Commission and the State Historical Building Code Board, which filed requests attacking alleged underground regulations issued by other state agencies.

Focusing on the private sector, entities actively participating in the Regulatory Determinations Program include the Pacific Gas and Electric Company, the Dow Chemical Company, the Sierra Club, the Environmental Defense Fund, the California Chamber of Commerce, the California Taxpayers Association, the California Restaurant Association, the Legal Aid Societies of Marin and San Mateo County, Chevron USA Inc., Protection and Advocacy, Inc., the Pacific Legal Foundation, several labor unions, and numerous private citizens.

6. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

No comments from third parties were submitted in this proceeding. The Department of Parks and Recreation's Response to the Request for Determination was received by OAL and was considered in this determination proceeding.

7. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute).

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8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
9. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for \$3.00.

10. Statutes of 1927, chapter 128 (codified as Political Code sections 373 through 373i) created the Department of Natural Resources, the Division of Parks within the Department, and the State Park Commission. It provided that the Commission would make general policies for the administration of the State Park System (See section 1 of the act, Political Code sections 373, 373a and 373d).

Statutes of 1927, chapter 763 pp. 1477-1479 (uncodified), created the State Park System (section 2 of the act), placed it under the control of the Director of Natural Resources acting through the State Park Commission (section 1 of the act), and delegated to the Commission the power to "establish rules and regulations for the government and administration of the State Park System, not inconsistent with law, . . ." (section 3 of the act).

Statutes of 1939, chapter 93 recodified the material originally placed in Political Code sections 373 through 373i in the newly created Public Resources Code in Division 1 (sections 501 through 514); and, codified for the first time the material contained in statutes of 1927, chapter 763 in Division 5, sections 5001 through 5022.

By Statutes of 1959, chapter 2164 the Commission lost a significant part of its influence over the operation of the Park System through the amendment of section 5001 to provide that the system was under the control of the Director of Natural Resources acting through the Division rather than the Commission; and that the Department of Natural Resources had the power to establish rules and regulations for the government and administration of the system.

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The Commission retained its power to make general policies for the guidance of the Director in the administration of the State Park System, and in statutes of 1971, chapter 1722 was delegated a more specific policy making role in the classification of individual units of the Park System and the review of the Department's plans for the management and development of individual units of the Park System.

The names of agencies which have administered the Park System have been changed several times, and these changes are not discussed here. Of greater significance is statutes of 1965, chapter 1144, which reorganized the administration of natural resources in California. A newly created Department of Parks and Recreation succeeded to the role formerly occupied by the Department of Natural Resources in the administration of the State Park System.

11. Public Resources Code section 5003.
12. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

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Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

13. Public Resources Code section 5003.
14. Authority to establish general policies for the guidance of the Director of the Department of Parks and Recreation remains in the State Park and Recreation Commission (Public Resources Code section 539); and, particular authority to determine the classification of, and to review plans for the management and development of units of the State Park System (Public Resources Code sections 5019.50, 5002.2 (a)).
15. "Auburn Reservoir Project / Folsom Lake State Recreation Area Preliminary General Plan," p. 12. Management of lands subject to the jurisdiction of federal agencies for the purposes of the State Park System is authorized by Public Resources Code section 5080.30, and specific authority to enter into agreements for the management of recreation resources at the Auburn Dam and reservoir, and streams in the immediate vicinity thereof, is provided at Public Resources Code section 5006.6.
16. The Department's Response indicates "an agreement with the United States Bureau of Reclamation, and for those resources in particular [boating activity on the river], a MOU with all state and federal agencies having property or management interests in that area (p. 1)." The 1987 Draft Management Plan indicates "recurrent one year contracts." These agreements have not been made a part of the record of this determination proceeding and are not considered in this review.

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17. DWWMP, pp. 2-7, 2-8.
18. In its Response, the Department characterized these as "public meetings." In the DWWMP, the Advisory Task Force is described as being:

"composed of several commercial operators, several non-commercial boaters, representatives of some local conservation groups, representatives of many of the resource agencies involved, and State Park Personnel assisted by Chuck Watson." (DWWMP, p. 1-4).

Details of how the public was notified of the meetings, and of how members of the task force were selected, are not included in the record, and not material to this determination proceeding.
19. This information is taken from the DWWMP. The Department's Response indicates only twelve meetings were conducted.
20. "Because of time delays and potentially complicated commercial permit and concessionaire processes, the final WWMP is scheduled to apply in the 1988 season; for the 1987 season the existing permit process will be in effect." DWWMP, p. 1-4.
21. Cal. Reg. Notice Register 89, p. 3090.
22. Response, p. 2.
23. Title 14, CCR, section 4753, filed January 28, 1986; effective thirtieth day thereafter (Cal. Admin. Code Supp. 86, No. 5).
24. Public Resources Code section 5001.9.
25. Public Resources Code section 5002.2, subdivision (a).
26. "The Auburn Reservoir Project / Folsom Lake State Recreation Area Preliminary General Plan" dated October, 1978 appears to be a preliminary plan. There is no indication that it is

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considered a complete section 5002.2 plan by the Department or that it has been submitted to and approved by the Commission as required by Public Resources Code section 5002.2.

27. Public Resources Code section 501.
28. The record does not include a copy of this order. For purposes of this Determination OAL assumes that the order issued the permit system as described in the "Commercial Boat Permit" applications, conditions, and rules.
29. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
30. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.
31. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
32. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

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33. In that the Department did not cite, nor are we aware of, any existing law which would provide otherwise, the following are a few examples of regulatory material contained in the 1990 Commercial Boat Permit Application:

Section B - USE PERMIT REQUIREMENTS:

- 1.1 Maximum of one (1) start allowed per day.
- 1.2 Maximum of six (6) boats per trip in any combination of paddle boats and oar boats
- 1.3 Minimum of (2) boats required per company per start
-
- 1.7 Permittees are required to utilize their assigned start dates.
- 1.8 (a) Permittees wishing to transfer Drawn Start dates to the Open Pool without penalty must notify State Parks, in writing, on a State Park ASSIGNMENT TRANSFER ticket (DPR 770a) no later than ten (10) days prior to the start date.

(b) Permittees wishing to transfer Drawn Start dates to a different company without penalty must notify State Parks in writing, on a State Park ASSIGNMENT TRANSFER ticket (DPR 700a) no later than the close of business on the Thursday before the start date.
-
- 3.1 Boats shall bear upon both the right and left sides, clearly visible from either bank of the river, PERMANENTLY AFFIXED lettering containing the permittee's name, approved abbreviation, or approved logo. Temporarily affixed lettering or logos is not allowed.
-
- 4.1 The tour operator must be the State-permitted agency; subcontracting is not allowed. "Subcontracting" constitutes the sale or purchase of a start date. The Department reserves the right to audit the permittee's financial records at any time.

. . . .

4.4 COVERAGE AND SPECIAL ENDORSEMENTS

The State of California is to be named as additional insured in a policy of liability insurance which will cover the period of this permit. This policy of liability insurance is to be in an amount not less than \$500,000 Combined Single Limit (CSL), and shall be underwritten to the satisfaction of the State, with the understanding that as soon as \$1,000,000 coverage is available (through at least two independent sources) the higher coverage will be required, and any outfitters that do not obtain the higher coverage will be in violation of their permits. .

. .

. . . .

Section C - PERMIT ENFORCEMENT:

. . . .

4.7 Automatic Suspension

- (a) Operating without proper insurance coverage.
- (b) Failure to pay penalty fine within ten days of date of notification will result in suspension until paid, plus an additional minor violation for this failure.
- (c) Failure to pay use fees (per Section B.4.1) will result in suspension until paid in full, including 10% late fee.

4.8 Major Violations: (Cumulative regardless of Section)

1st Violation - \$250.00
2nd Violation - \$500.00
3rd Violation - Permit revocation for 12 month period.

The following are MAJOR Violations:

- (a) Exceeding one (1) start per day per permit.
- (b) Exceeding maximum trip size (Sec. B.1.2).

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- (c) Exceeding seven (7) persons per paddle boat or six (6) persons per oar boat, including guides and trainees (Sec. B.1.2).
- (d) Reporting training boats as commercial boats, or reporting "dummy use", on TRIP TICKETS or end of season reports.
- (e) Transportation of clients on Sliger Mine Road or Ford's Bar Road (Sec. B.2.0).
- (f) Operating without proper insurance coverage (Secs. B.4.3 and B.4.4).
- (g) Allowing passengers to ride without PFDs.
- (h) Unauthorized non-emergency use of private land.
- (i) Subcontracting a trip.
- (j) Starting a trip on a Control Day without a start.

4.8 Minor Violation: (In same Section)

- 1st Violation - \$100.00
- 2nd Violation - \$250.00
- 3rd Violation - \$500.00
- 4th Violation - Permit suspension for 14 days with carryover to successive season.

Any Total of 6 Violations - Permit suspension for 14 days with carryover to successive season.

Any violation of "Section B - USE REQUIREMENTS," other than those sections listed in Automatic Suspension and Major Violations (Secs. C.4.7 and C.4.8) are considered Minor Violations.

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Section F - PERMIT FEE:

A non-refundable \$150.00 permit fee will be tendered to the California Department of Parks and Recreation by the applicant upon submission of completed rafting permit forms to the American River District Headquarters.

34. State Parks, 40 Ops.Cal.Atty.Gen 11, 13-15 (1962). The general rule permits supplementary local regulation of activity on state land, "provided that such local regulation does not amount to an attempt to, direct or indirect, to control state functions."

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35. The regulations of the Department of Boating and Waterways are found at Title 14, CCR, Division 4 (sections 5000 through 8600). Article 3 (sections 6501 through 6505) deals with boating accident and casualty reporting. Article 4 (sections 6550.5 through 6576) deals with equipment requirements.
36. That the waters be navigable appears to be a precondition to applicability of Department of Boating and Waterways regulations. Two cases relating directly to commercially operated recreational whitewater boating and rafting on navigable rivers in northern California are: People ex. re. Younger v. County of El Dorado (1979) 96 Cal.App.3d 403, 157 Cal.Rptr. 815, and Scott-Free River Ex. v. El Dorado County (1988) 203 Cal.App.3d. 896, 203 Cal.Rptr. 504.
37. See Title 14, CCR, sections 6565.4 through 6566.
38. Title 14, CCR, sections 6569 through 6573.
39. Title 14, CCR, sections 6500 through 6505.
40. The regulations of the California Highway Patrol concerning busses are found at Title 13, CCR, Subchapter 6.5 (sections 1200 through 1293). Busses are divided into a number of categories for purposes of these regulations, and different categories of use are defined. Which particular rules of the California Highway Patrol are applicable to particular vehicles subject to particular uses, cannot be determined from the record, and would not be within the ambit of this determination.
41. "Use Requirements," Section E, p. 9.
42. "Use Requirements," Section I, p. 10.
43. Government Code section 11346.
44. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

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- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San

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Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tandé Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$108.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

45. In a case involving a federal National Park Service permit allocation regulation for boating and rafting on the Colorado River, the United States Court of Appeals for the Ninth Circuit decided that the subject rule was excepted from the application of the federal Administrative Procedure Act by a provision of the Act, 5 U.S.C. section 553(a)(2), which provides an exception for matters relating:

". . . to public property, loans, grants, benefits, or contracts."

Wilderness Public Rights Fund v. Kleppe (9th Cir. 1979) 608 Fed.Rptr.2d 1250, 1253, rehearing denied November 1, 1979, rehearing en banc denied December 17, 1979.

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There is no analogous exception in the California APA.

46. Government Code section 11346 sets out the possibility of express exceptions to the application of the APA as follows:

"It is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly.

Except for changes to the embedded reference to section 11346.1, this language has remained the same since its adoption in statutes of 1947, chapter 1425.

47. Government Code section 11342.1.
48. Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1135-1136, Faunce v. Denton (1985) 167 Cal.App.3d 191, 197, 213 Cal.Rptr. 122, 125.
49. The Department's "posted order" process may relate to subdivision (a)(2) of Government Code section 11343, which provides:

"Every state agency shall:

"(a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one which: . . .

"(2) Relates to the use of public works, including streets and highways, when the effect of the regulation is indicated to the public by means of signs or signals or when the order determines uniform standards and specifications for official traffic control devices pursuant to Section 21400 of the Vehicle Code. . . . "

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Subdivision (a) of Government Code section 11346.1 provides that regulations which are not required to be filed with the Secretary of State are not required to be adopted pursuant to the APA.

Although this language has been cited from time to time as an example of a class of regulations which is not subject to the rulemaking and rule effectiveness provisions of the APA, it has not been applied or interpreted in any reported case; nor, has it been applied or interpreted in a California Attorney General's Opinion. We are satisfied that it does not authorize the establishment of a twenty-page document as a "regulation" by posting it on a bulletin board.

50. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tandé Montez in the processing of this Request and in the preparation of this Determination.